IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 442 of 1991
With
FIRST APPEAL No. 443 of 1991
To
FIRST APPEAL No. 444 of 1991
With
CROSS OBJECTION No. 20 of 2007
In
FIRST APPEAL No. 442 of 1991
To
CROSS OBJECTION No. 22 of 2007
In
FIRST APPEAL No. 444 of 1991

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GUJARAT STATE ROAD TRANSPORT CORPORATION - Appellant(s)
Versus
ASHOKKUMAR JAMNADAS KOTAK & 4 - Defendant(s)

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Appearance :

MS MAYA DESAI for GSRTC,
MR HM LATHIA WITH MR PARAS LATHIA for the claimants,
all the matters.

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 17/07/2007

ORAL JUDGMENT

1. Ms.Maya Desai, learned counsel for the appellant - Gujarat State Road Transport Corporation in each of the appeal and Mr.H.M. Lathia, learned senior counsel with Mr.Paras Lathia, learned counsel for the respondents claimants in each of the matter.
2. Gujarat State Road Transport Corporation, being aggrieved by the award dtd.28/2/1990 made in Motor Accident Claim Petition Nos.515, 552 and 569 of 1982, has come to this Court with the submission that the Motor Accident Claim Tribunal (Main), Rajkot was unjustified in making the award in favour of the claimants. It is, however, to be noted that the appellant – Gujarat State Road Transport Corporation has confined its claim to the monetary liability, therefore, it is not necessary for this Court to enter into the factual disputes about the rashness, negligence, liability and entitlement of the claims.

3. On 20/4/1982 at about 1.30 in the midnight, there was an accident between the rickshaw and bus, belonging to the Gujarat State Road Transport Corporation. According to the claimants and owner of the rickshaw, who also happens to be the driver, the driver of the bus was rash and negligent, it gave a direct hit to the rickshaw and dragged the rickshaw at least 100 feet. According to some of the passenger – claimants , the driver of the rickshaw was also negligent and therefore, they joined the rickshaw driver as party non-applicant.

4. Each of the passenger namely Vinodray Mansukhlal Kotak, Mahemudsha Ibrahimsha, Rameshchandra Tribhovan Shah and Ashokumar Jamanadas Kotak, who suffered injuries, joined the driver of the rickshaw as party defendant. The driver of the rickshaw - Ahmad Usman Kureshi also filed a claim petition being an injured and he also filed a claim petition to recover the loss suffered by the rickshaw. On one side, the inmates of the rickshaw were making allegations against Ahmad Usman Kureshi – driver of the rickshaw that he was rash and negligent, the claimants were represented by Mr.H.M. Lathia, learned counsel in all such claim petitions, the claimants were claiming relief against Ahmad Usman

Kureshi – driver of the rickshaw, but at the same time, said Ahmad Usman Kureshi – driver of the rickshaw had filed a claim petition through Mr.H.M. Lathia, learned counsel and also filed yet another claim petition for recovery of loss suffered to the properties.

5. I do not understand as to how Mr.H.M. Lathia, learned counsel for could represent both the sides. It is for him to decide whether he could represent the party plaintiff and the party defendant at the same time and should continue to remain their representative even in the High Court. The representation of different persons who are having conflict of interest by the same counsel would certainly amount to misconduct, but, I would leave it at this place and would only request Mr.Lathia, learned counsel to have an introspection in the retrospect.

6. Gujarat State Road Transport Corporation has filed First Appeal No.442 of 1991 arising out of Motor Accident Claim Petition No.569 of 1982, which was filed by Ashokkumar Jamnadas Kotak. Gujarat State Road Transport Corporation has also filed First Appeal No. 444 of 1991 arising out of Motor Accident Claim Petition No. 515 of 1982, which was filed by Rameshchandra Tribhovan Shah. Gujarat State Road Transport

Corporation has also filed First Appeal No. 443 of 1991 arising out of Motor Accident Claim Petition No.552 of 82, which was filed by Ahmad Usman Kureshi in his capacity as an injured.

7. The learned tribunal has found that the driver of the bus and the driver of the rickshaw were negligent to the extent of 60% and 40% respectively.

8. In case, the appeal filed by Gujarat State Road Transport Corporation is partly or fully allowed, then, Ashokkumar Jamnadas Kotak and Rameshchandra Tribhovandas Shah would be entitled to recover the entire amount of compensation from Ahmad Usman Kureshi, because Ahmad Usman Kureshi has not filed any cross appeal challenging his liability fixed at 40%.

9. Ms.Maya Desai, learned counsel for the appellant – Gujarat State Road Transport Corporation, taking up case of Ahmad Usman Kureshi submitted that in absence of any evidence that the claimant had suffered injury to his head or brain, which led to epileptic attack or loss of memory, the tribunal, simply on the basis of statement of Dr.Desai, could not hold that the patient had suffered loss of memory, forgetfulness and has become burden on the family.

10. Mr.Lathia, learned counsel for the claimant – cross-objectors submits that the evidence of the Doctor cannot be brushed aside lightly, the court would have no jurisdiction to substitute its own own opinion against the opinion of an expert, the provisions of Evidence Act would not apply and in case of a non-employed person or a person who does not have any future or any future prospect, his monthly income should be assessed at Rs.3000=00 per month.

11. In support of the submissions relating to the expert's opinion, Mr.Lathia, learned counsel for the claimant has relied upon certain judgements which I will refer to. Mr.Lathia, learned counsel for the claimant, firstly relied upon the judgement of the Apex Court in the case of Kshetriya Kisan Gramin Bank Vs. D.B. Sharma and others, Volume VIII (2000) SLT 269 to contend that the court should not substitute its opinion against the opinion of an expert.

12. In the matter of Kshetriya Kisan Gramin Bank (supra), the court was considering the case of a report submitted by an expert body, the court observed that in a particular field, if certain experts, after considering everything record a finding, then, the court is not required to

interfere in the matter.

13. In the matter of of Medical Council of India Vs. Sarang and others, Volume VI, (2001) SLT 193 and in the matter of State of Rajasthan Vs.Lata Arun, AIR 2002 SC 2642, the Supreme Curt was taking into consideration the opinion of the Medical Council of India in relation to migration certificates and what would be the effect of a student prosecuting 18 months' prescribed study before appearing in second professional examination at transferee Medical College. In the case of State of Rajasthan (supra), the Supreme Court was observing that it was the decision of the expert body / medical council that whether a particular educational qualification is equivalent to the qualification prescribed by the authority would always remain in the domain of Nursing Council. The Supreme Court nowhere held that in relation to the opinion of the expert where certain questions are to be decided on the basis of a particular opinion of the expert, the court should not interfere.

14. Confronted with sec.45 of the Indian Evidence Act, Mr.Lathia, learned counsel for the claimant next contended that the provisions of Indian Evidence Act are not applicable to the proceedings conducted by a

tribunal. He submits that in the matter of Union of India Vs. T.R. Verma, AIR 1957 SC 882, the Supreme Court for its universal application has observed that the provisions of the Indian Evidence Act do not apply to an inquiry by a tribunal.

15. Sec.45 of the Indian Evidence Act relates to the opinion of the expert, it says that when the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art or in questions as to identity of handwriting or finger impressions are relevant facts. Such persons are called experts. From sec.45 of the Indian Evidence Act, it would clearly appear that if the court wants to form its opinion, then it can rely upon the opinion of an expert. The persons who are specially skilled in foreign law, science or art would submit their opinion to the court so that on the basis of such opinion, the court can form its opinion. The law nowhere says that the opinion of an expert shall bind the court and the court would not be entitled to form its opinion. It would be misconceived submissions that the court would not be entitled to examine opinion of an expert and record its

own opinion.

16. Before I enter into the said argument, I must observe that the Motor Accident Claim Tribunal though is addressed as a tribunal, but, in fact, is a Court and it is not a quasi judicial tribunal, but it is a court, constituted under the provisions of Motor Vehicles Act and a Judge appointed as a Member of the Motor Accident Claim Tribunal is required to exercise its judicial powers in making the award either in favour or against a claimant.

17. In the matter of Union of India (supra), the Supreme Court was not considering the case of a court. There the case was in relation to a tribunal which was making an inquiry into the conduct / misconduct of a workman. There the question of admissibility of the evidence came up for consideration and the Supreme Court observed that the Indian Evidence Act has no application to inquiries conducted by tribunals (emphasis supplied) even though they may be judicial in character. The law requires that such tribunal should observe rules of natural justice in conduction of the inquiry and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that which obtains in a court of law.

18. I pose a question to myself that in a given case, if each of the party examines an expert and each of the expert submits his opinion before the Court and then the court, according to Mr.Lathia, learned counsel for the claimant, is not in a position to accept one or the other report, then it would become almost impossible for the court to accept or reject one of the report.

19. Sec.54 assuming for a minute, though I absolutely do not agree with the submissions of Mr.Lathia, does not apply to the trial conducted by the Motor Accident Claim Tribunal, then too, the court has to form its opinion on the strength of opinion which the court considers to be better one. The court has to consider expert's opinion as pieces of evidence and after examining the evidence, the court has to accept one or the other opinion.

20. It was contended by Mr.Lathia, learned counsel for the claimant that for all three respondents – claimants, who have filed Cross Objections, this Court must hold that their monthly income would not be less than Rs.3000=00 per month. Mr.Lathia, learned counsel submits that even if it is proved that a particular person was absolutely unemployed and had no future prospects, then too, the income should be assessed at Rs.3000=00 per month.

21. I am sorry, I cannot accept this argument of Mr.Lathia. If a person has no future prospects and is not earning anything, then, the court would only assess that what would be necessary for maintaining such a person.

22. Certain judgements which are relied upon to take a view that the income of such person, who was even grazing cattle, could be assessed at Rs.3000=00 per month, but such was the case where the accident took place in the year 2001, and in the present case, we are talking of case whether the accident took place in the year 1982.

23. To prove that what the man could earn and what would his future prospects, a party claimant is obliged to lead evidence to prove that what would be his future prospects. One cannot simply say that he is good for nothing and despite that he is entitled to best of the claim or compensation.

24. It was then submitted that disability qua each limb is to be assessed and the disability of the body as a whole is not to be assessed. Mr.Lathia, learned counsel for the claimant goes to the extent saying that the disability percentage of different limits are to be added and they may even go to 1000%.

25. I am shocked to hear such a revolutionary argument

from Mr.Lathia, learned counsel for the claimant. Disability is to be assessed qua earning capacity. If a driver suffers amputation of one leg, then, despite 50% medical disability, his future ability to earn is lost for ever and therefore, he becomes 100% disabled, but a person who is working as a Clerk. if loses part of his leg, then, his future prospects are not adversely affected nor his income would be adversely affected, because loss of the leg in such a case, would not affect his future prospects. Such a man would only be entitled to compensation for pain, shock, suffering and loss of the future amenities and enjoyment only. In a given case, if a pilot suffers an injury and loses one of his eye, then, he would suffer 100% disability, but in a case of yet another person who only uses his eyes for seeing or watching, then, in his case, loss of one eye would be reducing ability to 50% only. In a given cases, loss of a particular limb would decide the question of disability. I am also unable to hold that the disability percentage is to be added qua each limb and even it may cross 1000%. In fact, all the courts have been taking the view that the disability of a particular limb, whether the lower or upper, is to be calculated first and then a particular disability is to be

added to the disability of the other limb/s of the body and then the total disability suffered by person is to be determined.

26. Ms.Maya Desai, learned counsel for the Gujarat State Road Transport Corporation submits that Ahmad Usan Kureshi – driver-cum-owner of the rickshaw has failed in proving that he suffered any injury which could adversely affect his future and career. According to her, he has suffered the injury somewhere in October, 1982, and almost after a period of three years, he has been examined by Dr.Desai. After taking me through the evidence of Dr.Desai, she submitted that Ahmad Usman Kureshi could not be held to be a mentally retarded person nor it could be observed that the claimant's epileptic attack and forgetfulness was the result of the head injury which the claimant had suffered in the accident in question.

27. Mr.Lathia, learned counsel for the claimant submits that from the evidence of Dr.Desai, it would clearly appear that Ahmad Usman Kureshi has become an absolute liability on the family and has become mentally retarded, according to him, the tribunal should have awarded him some additional amount and should not have confined

award to the extent of 25% only.

28. Dr.Desai in his statement has clearly admitted that he had no papers with him, he did not produce any case papers, he also admitted that the patient was not examined at Cats Scanning Machine, he also admitted that the patient was simply physically examined and on the basis of the case history, he found that Ahmad Usman Kureshi was mentally retarded. Without any supporting evidence, he observed, on the basis of the case history as narrated to him, that the patient - Ahmad Usman Kureshi was suffering with loss of memory and was also suffering with epileptic attack. Though he tried to connect epileptic attack and loss of memory with the injuries suffered by the patient during the course of the accident, but he had to admit that there was no external injury on the person of Ahmad Usman Kureshi.

29. I would immediately concede that in case of concoction of brain or any other injury to duramatter or sub-duramatter or to the brain, an external injury is not required. But to connect the consequence with the cause, one is required to lead evidence that after suffering the injury,the patient had become epileptic or is suffering with loss of memory. Unfortunately, in the case

of Ahmad Usman, barring statement of the patient – claimant - Ahmad Usman and Dr.Desai that the patient – claimant Ahmad Usman had been taking medicine for anti-convulsion treatment, nothing else has been brought on records. In fact, there is no legal evidence to show or suggest that the patient become mental retarded or suffered mental degeneration as a result of the accident in question.

30. It would also be necessary to note that the claimant - Ahmad Usman Kureshi was examined as witness in the court, even otherwise, it is to be noted that the Ahmad Usman Kureshi did not file claim petition through his next friend or guardian, though he is claiming that he become mentally retarded. Provisions of Order XXXII Rule 3 of the Code of Civil Procedure provides that in case of a minor, infant, or mentally retarded person, a next friend is required to file a claim petition. If the claimant files the claim under his own signature, and steps in the witness box to narrate every fine detail, then, this court would be justified in presuming that he was not mentally retarded.

31. When the claimant - Ahmad Usman Kureshi was examined in the Court, the Court administered him oath, the court did not find that he was mentally retarded or

was suffering with loss of memory. In fact, the claimant - Ahmad Usman Kureshi had given finest details of the accident. If he had suffered loss of memory of the recent past or distinct past, then, he would not have been in a position to give the details of the accident. Once he started giving details of the accident and the court was finding that he was not mentally retarded, then, there would be no reason for the court to hold that he had suffered imbalance of the mind and loss to the extent of 25%. I am unable to hold that because of injury to the brain, the claimant - Ahmad Usman Kureshi has become a liability on the family. In my opinion, the claimant - Ahmad Usman Kureshi was not entitled to any amount beyond general damages of Rs.10,000. I would have set aside the award made in favour of Ahmad Usman Kureshi, but the appellant – Gujarat State Road Transport Corporation has confined its challenge to Rs.25,000=00 only, I would reduce the claim of Rs.75,000 to Rs.50,000=00 only. It is to be noted that the claimant - Ahmad Usman Kureshi has not filed any cross appeal or cross objections against the percentage of his negligence, therefore, this Court would be bound by the findings recorded by the tribunal. Under the

circumstances, I must hold that the driver of the bus was liable to the extent of 60% and Ahmad Usman Kureshi – driver-cum-owner of the rickshaw would be liable to the extent of 40%. As there was contributory negligence on the part of Ahmad Usman Kureshi, out of the total amount of Rs.50,000=00, he would be entitled to only 60% i.e. to the extent of the liability of driver of the Bus.

32. In case of Ashokkumar Jamnadas Kotak, it is to be seen that firstly he had made a claim of Rs.1,00,000=00 and thereafter it was enhanced to a sum of Rs.2,00,000=00, the tribunal has made an award in sum of Rs.92,000=00.

33. In case of Rameshchandra Tribhovan Shah, the tribunal has made an award in sum of Rs.71,000=00, the Gujarat State Road Transport Corporation has confined its claim to the monetary liability, therefore, I am not required to enter into any other details or discussion.

34. In case of Rameshchandra Tribhovan Shah, so also in case of Ashokkumar Jamnadas Kotak, it was contended that the income of each of the person should have been assessed at Rs.3000=00 per month. Unfortunately, each of the claimant did not lead any legal evidence and simply gave their statements that they were earning a particular amount. Ipse-dixit of a person can be relied

upon by the tribunal if such a person is unable to produce any other legal, admissible and cogent evidence. In the present case, businessmen who are dealing with number of persons, if are unable to produce any evidence to show that their income was Rs.3000=00 or more, the tribunal, in my opinion, would absolutely justified in assessing he monthly income at Rs.1000=00 and in further assessing future loss at 25% or Rs.250=00 per month. In case of Ashokkumar Jamnadas Kotak, multiplier of 20 has been applied which runs contrary to the judgement of the Supreme Court, the multiplier should not exceed 18. However, I would not interfere in the matter after such a long lapse of time specially after a period of 25 years of the accident and almost after about 16 years of the award made by the learned tribunal. In case of Ashokkumar Jamnadas Kotak, I do not find any good reason for making any enhancement.

35. In case of Rameshchandra Tribhovandas Shah, learned tribunal, even in absence of any evidence, has recorded that his income could be Rs.1000=00 per month. When the judgement was under dictation, Mr.Lathia, learned counsel got up and said that evidence is available on the record. On being asked to show the evidence, Mr.Lathia,

learned counsel submitted that there are 63 bills issued by the whole-seller in favour of the claimant which would show that he was purchasing cloth in the whole-sale and was selling in retail. It was, however, conceded before me that the Books of Accounts of Rameshchandra have not been produced in the Court, therefore, it would not be possible for anybody to assess as to what could be the monthly profit made by Rameshchandra Tribhovandas Shah. The bills produced by Rameshchandra Tribhovandas Shah – the claimant, would only show that he had purchased particular items from particular shops, but would not show what profit could be made out of the sale of the stock which was purchased from the whole-seller.

36. Though there is no evidence in favour of Rameshchandra Tribhovandas Shah to show that what could be his profit, but, in the opinion of this Court, the tribunal did not err in observing that the businessman could earn a sum of Rs.1000=00 per month. The tribunal was also not unjustified in holding that the future loss could be assessed at Rs.200=00 per month. The application of the multiplier of 15, though was condemned by Mr.Lathia, learned counsel for the claimant, but, in the opinion of

this Court, in case of a person of 35 years of age, multiplier of 15 can not be said to be absolutely unreasonable.

37. Taking into consideration the totality of the circumstances, I must hold that First Appeal No.442 of 1991 and Cross Objection No.20 of 2007 in First Appeal No.442 of 1991 deserve to be rejected. Similarly, First Appeal No.444 of 1991 and Cross Objection No.22 of 2007 in First Appeal No.444 of 1991 deserve to be dismissed, those are accordingly dismissed. Cross Objection No.21 of 2007 in First Appeal No.443 of 1991 deserves to be rejected and is accordingly rejected. But, however, First Appeal No.443 of 1991 is allowed to the extent indicated above.

(R.S. GARG, J.)

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